

STATE OF MICHIGAN  
SUPREME COURT



MEMORANDUM  
FOR COURT USE ONLY

TO: Justices

DATE: July 31, 2007

FROM: Justice Michael F. Cavanagh

SUBJECT: Judicial Resources Report

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CAVANAGH, J. (*dissenting*). In April 2007, Chief Justice Taylor publicly disclosed his desire to eliminate four Court of Appeals judgeships and up to fourteen trial court judgeships. Remarkably, in July 2007, the Supreme Court Administrative Office (SCAO) issued a report that recommends eliminating four Court of Appeals judgeships and fifteen trial court judgeships, essentially the same wishes Chief Justice Taylor expressed three months earlier. Despite the fact that the judicial resources report expresses the same fundamental recommendations as those articulated by Chief Justice Taylor and despite the majority's vote to forward the report to the legislature, the majority purports that SCAO's recommendations are not recommendations of this Court.

Yet the very first sentence of the original report's executive summary correctly stated, "The Michigan Supreme Court through the State Court Administrative Office (SCAO) is responsible for making recommendations to the Legislature regarding changes in the number of judgeships." This is indeed an accurate statement of the law, and the removal of this sentence from the report does not change this fact. The legal basis for development and delivery of the report is found in Michigan's Constitution. Regarding circuit courts, the constitution provides, "The number of judges may be changed and circuits may be created, altered, and discontinued by law and the number of judges shall be changed and circuits shall be created, altered and

discontinued *on recommendation of the supreme court* to reflect changes in judicial activity.” Const 1963, art VI, § 11 (emphasis added). Our legislature has further provided, “The *supreme court may make recommendations to the legislature* in regard to changes in the number of judges, the creation, alteration and discontinuance of districts based on changes in judicial activity.” MCL 600.8171 (emphasis added). Further, MCR 8.103 requires the State Court Administrator to compile and analyze various statistical data in order to transmit reports and make recommendations *to the Court* regarding the improvement in the administration of justice and the assignment of judicial business within the state court system.

Thus, when the majority denies that its 4 to 3 vote directing the State Court Administrator to forward the resources report to the legislature is a recommendation of this Court, it indulges in a charade. SCAO’s responsibilities are defined by this Court, and there is no independent authority for it to deal directly with the legislature unless directed to do so by this Court. Therefore, if the majority is to be credited as taking no position on the recommendations, it is the height of irresponsibility for the majority to direct the delivery of recommendations that it claims it has not yet approved, especially given the numerous analytical flaws in the report itself.

But contrary to the majority’s assertions, I do not believe that it is mere coincidence that three months after Chief Justice Taylor’s comments, the resources report echoes his publicly stated wishes. However, a thorough review of the resources report reveals that its analysis leaves many questions unanswered. The report’s recommendations are not supported by a reasonable analysis. Its methodology and data lack detail, and there is little analytical support for the recommendations made in the report. Chief Judge Whitbeck of the Michigan Court of Appeals has raised numerous concerns with the report’s methodology and lack of sound

analysis, and none of these concerns have been addressed. To name just one concern, Chief Judge Whitbeck has indicated that the dispositions and filings per judge have actually *increased* since 1996. This means that Court of Appeals judges are actually working under a heavier burden than their predecessors. So while the number of filings is down, the judges are doing more work – not less – because visiting judges are no longer being used to address the workload. Yet this critical fact is only dismissively addressed in the report and the important question – why should Court of Appeals judgeships be cut when the judges are actually needed to do more work than their predecessors – is ignored.<sup>1</sup>

The many oversights in the report indicate that it is not ready to be released to the legislature, yet the majority is unconcerned that a report that is analytically unsound is being distributed to legislators. Legislators should be able to rely on this Court’s guidance to make decisions relating to the court, but the majority leaves them with a report that it claims to not even approve. Of course, this alleged lack of approval is quite farcical, given Chief Justice Taylor’s public lauding of its recommendations. The majority’s flippant machinations are further highlighted by the minute amount of time allotted to review and discuss the report among members of this Court. As Justice Weaver details in her dissent, a mere twelve days after the report was issued, the majority voted to distribute the report to the legislature over objections by three members of this Court. The majority also voted against requiring the State Court Administrator to address the concerns raised by Chief Judge Whitbeck regarding the

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<sup>1</sup> Moreover, the constitution provides, “The number of judges comprising the court of appeals may be *increased* . . . .” Const 1963, art VI, § 8 (emphasis added). Reading the plain language of the constitution – as the majority has so often advocated – leaves me puzzled about the constitutional propriety of *decreasing* Court of Appeals judgeships through legislative action. The majority’s disinterest in examining the report’s recommendations in a thorough and thoughtful manner leaves this question unexplored.

specific data and methodology used in the resources report. Further, the majority denied an amendment that would also have provided Chief Judge Whitbeck's analysis to the legislature. If the majority's vote was truly one that did not approve the report and was merely approving the *distribution* of the report to the legislature, then one must wonder why the majority saw a downside to giving all relevant information to our legislators. If the majority truly has no opinion about the recommendations made in the report, then the detailed counterargument supplied by Chief Judge Whitbeck should be welcomed because a decision is best made when all relevant information has been presented. Yet the majority chooses to ignore the reasonable concerns raised by Chief Judge Whitbeck and altogether preclude an opportunity for the lower courts to provide their input.

Moreover, assuming that the majority is sincere in its desire to generate budgetary savings for the state, I am surprised that it has not explored other avenues that would not directly affect our citizens' access to the courts. The reality is that a decrease in the number of judges will only further delay the disposition of cases throughout the state. I know of no citizen who believes that court proceedings are now handled too quickly. The unfortunate fact is that citizens wait months and often *years* for a case to be resolved. This is not an indicator that our citizens' access to the courts should be further impinged by short-sighted attempts to appear economical. A decrease in the number of Court of Appeals judges, for example, will directly impact the delay reduction strides that have been made. I see no analysis in the resources report – and the majority is silent on – whether this trade-off is truly in our citizens' best interests.

Further, I note that recommendations made in the resources report diminish the role that judges play in deciding cases. The reality is that hiring additional research attorneys does not mean that Court of Appeals judges can be eliminated with no real effect on the disposition of

cases. A research attorney – no matter how good – is not a judge and should not be viewed as a substitute for a judge. While some judges are initially appointed, most judges are elected *by the people*. They bring to their position a wealth of experience and knowledge that makes them particularly suited for their position. They cannot just be exchanged for an attorney who is hired, no matter how talented that attorney may be. Research attorneys serve a role similar to that of Supreme Court commissioners, yet the majority would bristle at the suggestion that a justice’s role is diminished – or may not be needed at all - because of a commissioner’s preparatory work.

I believe that it is my responsibility as a justice of the Michigan Supreme Court to act as a steward of the public’s trust and funds. To me, this means that it is reckless to put forth unsound recommendations under the guise of budgetary savings, knowing full well that those who challenge these recommendations as being poorly thought out and not in the public’s best interest can now be politically labeled as spendthrifts. The public deserves – and should demand – more than soundbites disguised as sound and reasoned analysis. Approving an incomplete and analytically unsound report, all the while alleging that it merely is *approving* the distribution of the report, and publicly using emotionally charged language like “budget savings” is political maneuvering that violates the public’s trust and has no place in the business of this Court. Thus, along with concurring with the statement of Justice Weaver, I also strongly dissent.

WEAVER and KELLY, JJ. We join the statement of Justice Cavanagh.